BALANCING PARTY AUTONOMY AND PUBLIC POLICY IN INDIAN PRIVATE INTERNATIONAL LAW: INSIGHTS FROM *TRANSASIA PRIVATE CAPITAL V. GAURAV DHAWAN*

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I. INTRODUCTION

Rules on private international law are sparse in India. They stem from common law and draw heavily from English jurisprudence. In India, major developments in the jurisprudence surrounding party autonomy and choice of law rules have occurred in the context of arbitration. This article analyzes the recent decision of the High Court of Delhi (DHC) in *TransAsia Private Capital v. Gaurav Dhawan*[1] ("TransAsia") to dissect the Court's approach to issues turning upon the conflict of laws, particularly where party autonomy intersects with considerations of public policy.

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1. *See generally* Transasia Priv. Cap. Ltd. v. Gaurav Dhawan, (2023) 4 HCC (Del) 698 (India) (holding that the QBD validly exercised jurisdiction) [hereinafter *TransAsia*].

II. FACETS OF FOREIGN ELEMENTS IN A COMMERCIAL DISPUTE

In *TransAsia*, the petitioner sought to enforce a decision of the High Court of England and Wales (QBD) where the judgment-debtor (JD) was held liable to make payments under two Personal Guarantees.[2] The JD resisted enforcement of the decree by arguing that as the deeds designated the laws of the Dubai International Financial Centre (DIFC) and Singapore as the respective governing laws, the QBD applying English law was devoid of jurisdiction.[3]

Enforcement of foreign judgments in India is governed by the 1908 Code of Civil Procedure (CPC); a foreign judgement is deemed a "conclusive" determination of the rights and liabilities under litigation.[4] This presumption may be rebutted, and enforcement refused *inter alia* when the jurisdictional competency of the foreign court is questioned.[5] The general, albeit rebuttable, presumption is in favor of the foreign court's competence.[6]

Analyzing the asymmetric jurisdiction clauses in the Personal Guarantees and the discretion given to the lender to approach any "court of competent jurisdiction,"[7] the court in *TransAsia* found that the QBD validly exercised jurisdiction.[8] By upholding the QBD's application of Section 1140 of the 2006 English Companies Act, under which the director of a company can be served at the registered corporate address regardless of where he actually resides,[9] the DHC confirmed the "default rule" of

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2. *See id.* ¶¶ 3, 8 (specifying that the QBD found the JD liable to make payment as he had executed two unconditional personal guarantees against default of the corporate debtor in two credit facilities).

3. *See TransAsia*, *supra* note 1, ¶ 14 (stating JD's argument that "parties had designated the governing law to be that of the Dubai International Financial Centre and the Republic of Singapore respectively . . . in view of the said governing law clauses, the High Court of England could not have possibly either assumed jurisdiction or invoked English law.").

4. *See* Code of Civil Procedure, 1908, § 13 (India) (listing this rule and related exceptions).

5. *Id.* § 13(a).

6. *Id.* § 14.

7. *See TransAsia*, *supra* note 1, ¶ 17 (specifying that a court "will be a Court of competent jurisdiction where both the parties voluntarily and unconditionally subject themselves to the jurisdiction of that Court.").

8. *See TransAsia*, *supra* note 1, ¶¶ 30–31 ("By virtue of Section 1140(3) of the Act, the judgment debtor became liable to be viewed as residing in the United Kingdom and thus liable to answer any claims that may come to be lodged before courts in that country.").

9. *See id.* (arguing that Section 1140 "engrafts a presumption that such a person consents to be subject to the jurisdiction of courts in England.").

applying *lex fori* where the parties have not specifically pleaded and proved the application of foreign law to the dispute.[10]

III. THE DEFAULT RULE – FOREIGN LAW AS A FACTUAL ISSUE

The DHC held that "the High Court of England has in this regard noticed that the judgment debtor had failed to either plead or establish that English law would not be applicable. As per the law which has evolved on the subject and stands duly enunciated by courts in England including in Brownlie, it is the aforesaid principles and the default rule which would thus govern the issue."[11] This court's analysis highlights that Indian courts recognize and follow the English common law rule of automatically applying its own law unless the parties plead and prove the requisite foreign law. While a foreign state's law may be chosen to govern a contract, its application is an issue of fact and courts are not required to automatically take judicial notice of it.[12] The parties must specifically plead and prove the applicability of foreign law as a matter of procedure.[13] Indian law requires an expert to provide evidence for the court to form an opinion on this issue,[14] however such evidence is merely advisory and therefore does not bind the court.[15] Moreover, the Supreme Court of India (SCI) has held that evidence of foreign law must be led as in a trial and cannot be established merely through testimony via affidavit.[16] Unlike English law, Indian courts are not restricted to the evidence led by parties, and may choose to consult their own resources.[17]

In *TransAsia*, the DHC accepted that the contract undisputedly provided for each Personal Guarantee to be governed by a different foreign

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10. *Id.* ¶ 39.

11. *Id.* ¶ 33.

12. STELLINA JOLLY & SALONI KHANDERIA, INDIAN PRIVATE INTERNATIONAL LAW 49 (1st ed. 2021) [hereinafter Jolly & Khanderia].

13. *Id.*

14. *See* Bharatiya Sakshya Adhiniyam, 2023, § 39(1) (addressing opinions of third-persons in court).

15. *See* Sai Ramani Garimella & Wasiq Abass Dar, *India*, *in* TREATMENT OF FOREIGN LAW IN ASIA 271, 279–280 (Kazuaki Nishioka ed., 2023) (noting that "[e]xpert testimony is only corroborative in nature.") [hereinafter Garimella & Dar 2023].

16. Shin Etsu Chem. Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234 ¶¶ 81–82 (India).

17. *See* Garimella & Dar 2023, *supra* note 15, at 281 (noting that "judges need not be restricted to the means of evidence submitted by the parties, they can consult reports, textbooks, and other secondary sources on their own . . . .").

law.[18] However, as neither party pleaded the application of DIFC or Singaporean law, the court relied on *FS Cairo (Nile Plaza) LLC v. Brownlie* which held that in such a scenario, "parties are tacitly agreeing that English law should be applied to decide the case."[19] The DHC thus held that governing law clauses are not "inviolable" and as a general rule the *lex fori* will prevail. [20] This raises the question of the relevance of party autonomy in making the choice of governing law, which in itself can sometimes be a contentious issue.

IV. PARTY AUTONOMY IN INDIAN PRIVATE INTERNATIONAL LAW

Private international law rules are not widely discussed in India. In general, the courts follow common law principles as developed by English courts. Jurisprudence has mostly developed through judicial precedents, with decisions of the SCI binding the courts of the entire country.[21]

A. *Choice of Law and Proper Law of a Contract*

Contracts are governed by the law expressly or impliedly chosen by the parties.[22] India follows the common law rule of enforcing the "proper law" of the contract; an express choice of law overrides presumptions, and where there is no express choice, the party's intent is to be inferred from the contractual terms and surrounding circumstances.[23] Where even intent

18. *See TransAsia*, *supra* note 1, ¶ 23 (specifying it was undisputed that "the two guarantee agreements referred to the governing laws to be that of the Dubai International Financial Centre and the Republic of Singapore.").

19. FS Cairo (Nile Plaza) LLC v. Brownlie [2021] UKSC 45 ¶ 114. *See also TransAsia*, *supra* note 1, ¶ 32.

20. *TransAsia*, *supra* note 1, ¶ 33.

21. *See* India Const. 1950, art. 141 (articulating that the "law declared by the Supreme Court shall be binding on all courts within the territory of India.").

22. Priya A. Sondhi & Anoop Kumar, *Indian Practice of Private International Law*, *in* INDIAN PRACTICE OF INTERNATIONAL LAW: GLOBAL NORMS AND THEIR DOMESTIC ENFORCEMENT 282, 289 (Siddhartha Misra ed., 2024) [hereinafter Sondhi & Kumar, 2024].

23. *See* Dhanrajamal Gobindram v. Shamji Kalidas and Co., (1961) 3 SCR 1029 ¶ 37 (India) (outlining how the proper law should be determined).

cannot be inferred, the court must look to the system of law with which the transaction has the "closest and most real connection."[24]

The position on the choice of State law is well settled. However, the same cannot be said for the choice of non-State or soft law for the purposes of court litigation. India does not have any judicial dicta either accepting or rejecting the choice of soft law as proper law of a contract.[25] However, an analysis of the SCI's obiter in *NTPC* shows that multiple references have been made to "legal systems" which indicates that under Indian private international law, parties may not choose non-State law[26] without including recourse to arbitration.[27] Pertinently, courts have sometimes referred to soft law rules such as the UNIDROIT Principles on International Commercial Contracts to inform their adjudication of commercial contract disputes.[28]

It bears mentioning that an exclusive jurisdiction clause, that is, a choice of forum, may be construed as an indication by the parties to choose that country's law as the proper law of the contract;[29] however, such tacit indication of choice of law through a choice of forum must be "clearly

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24. Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh, AIR 1955 SC 590 ¶ 27; National Thermal Power Corporation v. Singer Company, (1992) 3 SCC 551 ¶¶ 13, 17 [hereinafter *NTPC*].

25. Saloni Khanderia & Sagi Peari, *Party Autonomy in the Choice of Law under Indian and Australian Private International Law: Some Reciprocal Lessons*, 46 COMMONWEALTH L. BULL. 711, 722–723 (2020).

26. *Id.*; *See NTPC*, *supra* note 24, ¶¶ 15–17 (holding that "the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place . . . For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection."); Jolly & Khanderia, *supra* note 12, at 202 (arguing that " private international law does not permit parties to choose a non-state law if the dispute is being adjudicated before a court (and not through arbitration).").

27. *See* Arbitration and Conciliation Act, 1996, § 28 (stating the rules applicable to the substance of a dispute, specifically that "any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules . . . .").

28. *See e.g.*, Hansalaya Properties v. Dalmia Cement (Bharat) Ltd., [2008] 106 DRJ 820 (DB) ¶ 29.

29. *See* V. C. GOVINDARAJ, THE CONFLICT OF LAWS IN INDIA: INTER-TERRITORIAL AND INTER-PERSONAL CONFLICT 57 (V.C. Govindaraj ed., 2nd ed. 2019) (discussing the Supreme Court of India's approach to inferred choice of law).

inferred"[30] from the surrounding circumstances.[31] A mere choice of forum is not sufficiently indicative of choice of law,[32] though a rebuttable presumption in favor of this choice may be drawn.[33] The DHC's decision in *TransAsia*, though not precisely on this point, further underscores the value of "tacit" and "implied" consent of parties.

It is now settled that parties are free to choose a governing law that has no nexus with them or the transaction.[34] This stance has been extended to arbitration agreements between two Indian parties as well.[35] In general, it has become clear that a choice of law is disregarded only if it is not legal, not made bona fide, or is in contravention of public policy.[36]

B. *Contours of Public Policy*

The issue of public policy remains a widely contested subject in India with little jurisprudence on issues emanating from commercial contracts outside of the arbitration context. The perspective of sovereign control and territoriality has played an important role in informing this debate which involves "notions of public interest, public morality, and public security . . . ."[37] An established feature of India's judicial system is that application

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30. *NTPC*, *supra* note 24, ¶ 13.

31. Jan L. Neels, *Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an Appeal for an Inclusive Comparative Approach to Private International Law)*, 1 *in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW - ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL TO CELEBRATE HIS 70TH BIRTHDAY 358, 367 (UNIDROIT ed., 1st ed. 2016).

32. *Id.*

33. Shreejee Traco (I) Priv. Ltd. v. Paperline Int'l Inc., (2003) 9 SCC 79 ¶ 7; *See also* British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Indus. and Others, (1990) 3 SCC 481 ¶ 29 [hereinafter *British India Steam*] ("In the absence of an express choice the question of the proper law of contract would arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary.").

34. Modi Entertainment Network & Anr. v. W.S.G. Cricket Pte. Ltd., (2003) 4 SCC 341 ¶ 11 [hereinafter *Modi Entertainment*].

35. PASL Wind Solutions Priv. Ltd. v. GE Power Conversion India Priv. Ltd., (2021) 3 SCC 702 ¶ 89–91 (concluding that "nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.").

36. *British India Steam*, *supra* note 33, ¶ 31.

37. Sai Ramani Garimella, *Chapter 15: India's Private International Law Rules: Persistence of Colonial Law in a Post-Colonial State: A TWAIL Exploration*, *in* RESEARCH METHODS IN PRIVATE INTERNATIONAL LAW: A HANDBOOK ON REGULATION, RESEARCH AND TEACHING 286, 310 (Xandra Kramer & Laura Carballo Piñeiro eds., 2024).

of foreign law to a contract can be excluded on the ground that giving effect to that choice would violate the public policy of India.[38]

Importantly, foreign law cannot be discarded merely because it violates an Indian statute – to do so would "defeat the basis of private international law" to which India subscribes.[39] Certain sections of the Indian Contract Act, 1872 (ICA) enshrine rules of public policy in this context; the courts will discard a choice of law if the agreement is unlawful in terms of the ICA,[40] or is such that it operates in restraint of marriage, trade, or legal proceedings.[41]

The courts have refused to recognize foreign decisions that have been obtained by fraud,[42] or where enforcement of the determined right opposes justice or morality,[43] or that are unconscionable.[44] Jurisprudence in this area has developed principally in the context of arbitration. In *Renusagar Power Co. v. General Electric*, the SCI utilized the doctrine of public policy as "applied in the field of private international law" and held that enforcement of a foreign arbitral award would be refused if it is contrary to the fundamental policy of Indian law, interests of India, justice, or morality.[45] The current standard of public policy employed in commercial arbitration is that of "fundamental policy" and the "most basic notions of justice and morality."[46] The SCI in *Ssangyong Engineering & Construction Co. v. National Highways Authority of India* summarized the contemporary position holding the field and further held that a finding based on no evidence or in ignorance of vital evidence is also perverse.[47] Significantly, public policy concerns are also relevant in deciding the arbitrability of disputes under Indian law – rights *in rem* such as those emanating from criminal or

38. Saloni Khanderia, *Indian Private International Law vis-à-vis Party Autonomy in the Choice of Law*, 18 OXFORD UNIV. COMMONWEALTH L.J. 1, 12 (2018).

39. Technip SA v. SMS Holding Priv. Ltd. and Others, (2005) 5 SCC 465 ¶ 31.

40. Indian Contract Act, 1872, § 23.

41. *Id.* §§ 26–28.

42. Smt. Satya v. Teja Singh, (1975) 1 SCC 120 ¶¶ 52–55.

43. *Id.*

44. *See* Y. Narasimha Rao v. Y. Venkata Lakshmi, (1991) 3 SCC 451 ¶¶ 14–22 (finding a foreign decree on marriage unenforceable as it was contrary to equity and good conscience to recognize and enforce a decree that was against the statute under which the parties were married).

45. Renusager Power Co. Ltd. v. General Electric Co., (1994) Supp. (1) SCC 644 ¶ 66.

46. Arbitration and Conciliation Act, 1996, § 34(2).

47. Ssangyong Engineering & Construction Co. Ltd. v. Nat'l Highways Authority of India, (2019) 15 SCC 131 ¶ 41.

matrimonial disputes typically fall within the exclusive domain of the courts and cannot be arbitrated.[48]

C. *"Complete Justice"*

Indian courts, like the English, are courts of equity. Thus, there might arise situations where, in the interest of justice, the courts deem it necessary to subvert choices made by the parties. Two occasions where Indian courts have had occasion to discuss these powers are relevant and both pertain to the law of injunctions.

In *Modi Entertainment*, the appellant had a license to broadcast a cricket tournament held in Kenya on Indian television.[49] The parties had agreed that English law as applied by English courts would govern the contract. Yet the appellant approached Indian courts that were seeking to enjoin proceedings before English courts, arguing that the English proceedings would be oppressive and vexatious, as the chosen law has no connection with the transaction. While upholding the choice of neutral forum, the SCI held *inter alia* that an anti-suit injunction may be granted even against an exclusive jurisdiction clause to "prevent injustice."[50] However, the court qualified this by placing a heavy burden on the party asserting *forum non conveniens* to prove an "exceptional case" with "good and sufficient reasons."[51]

More recently, the DHC granted an anti-enforcement injunction in *Honasa Consumer* as an interim measure under the Arbitration & Conciliation Act, 1996 (A&C Act).[52] Here, the contract contained an arbitration clause with New Delhi as the venue and the A&C Act as the governing law.[53] Nonetheless, the respondent approached Dubai courts for resolution of the dispute and obtained a decree which is presently under appeal at the Dubai Court of Appeal.[54] The DHC here equated the court's power to grant

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48. Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd. and Others, (2011) 5 SCC 532 ¶¶ 23–26.

49. *Modi Entertainment*, *supra* note 34, ¶ 5.

50. *Modi Entertainment*, *supra* note 34, ¶ 24(4).

51. *Id.*

52. *See* Honasa Consumer Ltd. v. RSM General Trading LLC, 2024 SCC OnLine Del 5631 ¶ 35.1 [hereinafter *Honasa*] (holding that "a clear case for grant of an injunction, restraining the respondent from enforcing, against the petitioner, the decree passed by the Dubai Court, is made out.").

53. *Honasa*, *supra* note 52, ¶ 2.

54. *Honasa*, *supra* note 52, ¶¶ 3, 15.

interim measures of a court seized in the A&C Act[55] to that of civil court,[56] holding that "the power to grant an anti-suit, or anti-enforcement, injunction, would also be encompassed in the power to grant interim measures of protection as may be 'just and convenient', and would in any case be included in the power to pass orders to secure the ends of justice or to prevent abuse of the process of the Court, conferred by Section 151 of the CPC."[57]

The court's desire to prevent injustice, as particularly evident in *Modi Entertainment*, is directly linked to public policy considerations. The case highlights the tension between promoting international commerce through respect for party autonomy while ensuring justice and protecting important public policy interests. Similarly, though mainly in the arbitration context, the DHC's decision in *Honasa* also strongly favors upholding party autonomy. At first glance, *TransAsia* and *Honasa* appear to be contradictory, with the court disregarding an express choice of law in the former and challenging the principle of comity between nations to uphold the party's choice of arbitration through an anti-enforcement injunction in the latter. However, the two cases are in fact harmonious in their construction, as the court's decision to discard the express choice in *TransAsia* is due to the parties' later tacit choice of waiving the foreign governing law, evidenced by their decision to not plead its applicability.

V. CONCLUSION

Over the years, the Indian judiciary has sought to balance party autonomy and choice of law with the courts' vested interests in upholding public policy and ensuring just resolutions to disputes. The *TransAsia* case reinforces the significance of procedural requirements, such as pleading and proving foreign law, which often dictate the extent to which party autonomy is upheld.[58] These procedural rules can decisively shape outcomes, as even an express choice of law may be disregarded if improperly presented.[59]

While drawing heavily from English common law, Indian private international law has developed a distinct identity, navigating the fine line

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55. *See* Arbitration and Conciliation Act, 1996, §9 (addressing interim measures, etc., by the Court).

56. *See* Code of Civil Procedure, 1908, §151 (stating that "[n]othing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.").

57. *Honasa*, *supra* note 52, ¶ 29.7.

58. *See TransAsia*, *supra* note 1, ¶ 39.

59. *See e.g.*, *British India Steam*, *supra* note 33, ¶ 31.

between international commercial considerations and domestic policy imperatives. The *TransAsia* decision underscores this evolution, reflecting the dynamic intersection of public policy, procedural propriety, and judicial discretion. However, the legal landscape remains unpredictable, highlighting the need for clear guidelines on foreign contractual elements and public policy. Such reforms are essential to strengthen India's position as a preferred forum for resolving cross-border disputes.